Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARK C. ALBERS, JIM T. FREEGARD, DAVID W. MORAN, ERIN MORAN, DAVID PIERCE, CARMEL PRESSE, J. LYLE PRESSE, JEFF SCHLABS, MARK SHEEHAN, KIRK SMITH, DAVID M. STROBEL, STEVE VAN HORN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITON FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioners can be guilty of disorderly conduct when no member of the public is present or harmed by Petitioners' conduct.

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PETITION FOR WRIT OF CERTIORARI

All Petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 7, 2000.

OPINION BELOW ENTERED IN THE CASE

United States v. Mark Albers, et al., 9th Circuit No. 99-10071, dated 9/7/00 (2000 WL 1264595 (9th Cir.).

To Petitioners' knowledge, the opinion of the United States Court of Appeals for the Ninth Circuit has not yet been published and is reprinted in the Appendix to this Petition.

United States v. Mark Albers, et al., D.C. Ariz. No. CR 95-00448-RGS, dated September 7, 2000.

There was never a written opinion handed down by the United States District Court for the District of Arizona.

JURISDICTION

The judgment sought to be reviewed was entered on September 7, 2000. This United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review on Writ of Certiorari the judgment sought to be reviewed of the United States Court of Appeals for the Ninth Circuit. This

Petition is being filed within 90 days after entry of the judgment as provided by Supreme Court Rule 13.

CONSTITUTION AND REGULATIONS

Constitution of the United States, Amendment V.

Title 36, Code of Federal Regulations, Section 2.34(a)(4).

Title 36, Code of Federal Regulations, Section 2.17(a)(1) and (a)(3).

Title 36, Code of Federal Regulations, Section 7.70(a)(6).

Title 14, Code of Federal Regulations, Section 1.1(a).

STATEMENT OF THE CASE

All Defendants were charged by a two count Information with:

Count I: Delivering or retrieving a person or object by parachute within the confines of the Glen Canyon Recreation Area, Arizona side, in violation of Title 36, Code of Federal Regulations, Section 2.17(a)(3) and,

Count II: With disorderly conduct within the confines of the Glen Canyon Recreation Area, Arizona side, by engaging in conduct which was disorderly and created and maintained a hazardous and physically offensive condition, in violation of Title 36, Code of Federal Regulations, Section 2.34(a)(4).

All Defendants as a group went to a remote area of Lake Powell in the Glen Canyon Recreation Area and participated in jumping with a RAM-air aeroelastic wing-like cloth canopy, commonly called a parachute, from a cliff in a remote area of Lake Powell and landing on the surface of Lake Powell, Arizona side. Except for jumping from a cliff and landing on the surface of Lake Powell, there is no evidence of any other illegal conduct engaged in by Defendants at that time.

No member of the public, except Defendants, were present in the area at the time.

Title 36 of the Code of Federal Regulations, Section 2.17(a)(1) provides:

> "(a) the following are prohibited:
>
> (1) Operating or using aircraft in lands or waters other than at designated take-off or landing areas, except to the terms and conditions of a permit."

Title 36 of the Code of Federal Regulations, Section 7.70(a)(6) designates the entire surface of Lake Powell as an airstrip.

Defendants believed that the RAM-air aeroelastic wing-like cloth canopy used by them to jump from a cliff in the Glen Canyon Recreation Area and land on the surface of Lake Powell was not included within the definition of parachute as defined in Title 36, Code of Federal Regulations, Section 1.1(a) which only "retards the fall of a body or object through the air;" and believed their conduct was permitted by Title 36 of the Code of Federal Regulations, Section 2.17(a)(1), because the devices they

were using do much more than merely retard the fall of a body through the air.

All Defendants were found guilty of disorderly conduct and each Defendant was sentenced to pay a fine or $500.00 plus the additional sum of $345.33 for the cost of prosecution.

The United States Court of Appeals for the Ninth Circuit said:

> "The safety threat implicated in BASE jumping is most often the potential harm to the jumper due to the fatalities and injuries characterizing the extreme sport. We do not, however, discount the safety risk of BASE jumping posed to members of the public, particularly in areas where people are likely to congregate."

This case concerns alleged violations of National Park Service Regulations 36 CFR § 2.17(a)(3) and 36 CFR § 2.34(a)(4). The United States District Court for the District of Arizona had original jurisdiction for violations of federal law under Title 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I.

THE GOVERNMENT FAILED TO CHARGE AND PROVE THAT PETITIONERS' CONDUCT HARMED OR CREATED A RISK OF HARM TO THE PUBLIC WHEN NO MEMBER OF THE PUBLIC WAS PRESENT AT THE TIME.

All Defendants were charged by Count 2 of the Information with disorderly conduct by engaging in conduct

which was "disorderly," by "creating and maintaining a hazardous and physically offensive condition," in violation of Title 36, Code of Federal Regulations, § 2.34(a)(4). All Defendants were found guilty of disorderly conduct and each Defendant was sentenced to pay a fine of $500.00 plus the additional sum of $345.33 for the cost of prosecution.

Title 36 CFR § 2.34(a)(4) provides:

"§ 2.34 Disorderly Conduct.

(a) A person commits disorderly conduct when with intent to cause public alarm, nuisance, jeopardy or violence, or knowingly or recklessly creating a risk thereof, such person commits any of the following prohibited acts.

. . .

(4) creates or maintains a hazardous or physically offensive condition."

Disorderly conduct is a vague catchall phrase intended to proscribe conduct which causes public alarm or harm, or a risk thereof; so harm to the public is an essential element of disorderly conduct which must be charged and proved as distinguished from individual harm. *Garner v. State of Louisiana*, 368 U.S. 157, 163-65, 82 S.Ct. 248, 251-53, 7 L.Ed.2d 207 (1961).

This Petition for a Writ of Certiorari is limited solely to Count II of the Information charging all Defendants with disorderly conduct and presents the issue whether an alleged violation of Title 36 of the Code of Federal Regulations, Section 2.17(a)(3) creates a hazardous and physically offensive condition to the public and is per se disorderly conduct when no member of the public except

Defendants were present; no member of the public was present to be alarmed, harmed or threatened with harm in any way by Defendants' conduct.

All Defendants allegedly assembled and participated in jumping without a permit with a RAM-air aeroelastic wing-like cloth canopy, commonly called a parachute, from a cliff in a remote area of the Glen Canyon Recreation Area, Arizona side, and landing on the surface of Lake Powell. Title 36 of the Code of Federal Regulations, Section 7.70(a)(6), designates the entire surface of Lake Powell as an airstrip.

There is no evidence that any member of the public other than Defendants were present in the area at the time; or that the public was harmed or threatened with harm in any way by Defendants' conduct, and there is no evidence that the Defendants engaged in any conduct other than jumping from the cliff and landing on the surface of Lake Powell. The United States Court of Appeals for the Ninth Circuit erroneously speculated that some member of the public might be present, because Defendants were jumping from a cliff in a remote area of a National Park.

Count 2 of the Information charging Defendants with disorderly conduct fails to charge that Defendants' conduct harmed or created a risk of harm to the public so there is no charge upon which Defendants can be convicted of disorderly conduct; and the United States failed to prove that any member of the public, except Defendants, were present or harmed by Defendants' conduct, so there is no evidence upon which Defendants can be convicted of disorderly conduct. These are fatal defects

and Defendants' convictions of disorderly conduct should be reversed.

This United States Supreme Court has many times held that conviction upon a charge not made is a clear denial of due process; and that it is a violation of due process to convict and punish a person without evidence of guilt. *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629, 4 L.Ed.2d 654 (1960). *Gregory v. City of Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 947, 22 L.Ed.2d 134 (1969).

Conviction of Defendants for disorderly conduct without proof that any member of the public was harmed by Defendants' conduct violates Defendants' right to due process of law under the Fifth Amendment to the Constitution of the United States; and thereby imparts importance to this Petition, notwithstanding Defendants were respectively fined only $500.00 each.

The United States Court of Appeals for the Ninth Circuit, after quoting the definition of "recklessly" from the Model Penal Code:

> "The risk must be of such nature and degree that considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation."

speculated that harm to the public could be presumed without proof from the hazardous nature of Defendant's activity, notwithstanding no member of the public was present. Since Defendants knew that no member of the public other than Defendants were present in the area at

the time, Defendants could not know of any substantial risk of harm to the public and act recklessly. *Farmer v. Brennan*, 511 U.S. 825, 836-37, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994).

The United States Court of Appeals for the Ninth Circuit referred to the definition of "public" in the Model Penal Code as:

> "affecting or likely to affect persons in a place in which the public or a substantial group has access . . . "

and assumed some member of the public might be present because Lake Powell is in a National Recreation Area.

Defendants believed that the RAM-air aeroelastic wing-like cloth canopy used by them to jump from a cliff and land on the surface of Lake Powell in the Glen Canyon Recreation Area was more than a parachute and not included within the definition of a parachute in Title 14 of the Code of Federal Regulations Section 1.1 which defines a parachute as a device "[u]sed or intended to be used to retard the fall of a body or object through the air." The RAM-air aeroelastic wing-like cloth canopy as used by Defendants do more than "retard the fall of a body or object through the air" and is capable of vertical ascent and can soar horizontally in powerless flight for a record distance of 230 miles. So if Defendants allegedly violated Title 36, Code of Federal Regulations, Section 2.17(a)(3) the violation was unintentional and did not per se create or maintain "a hazardous or physically offensive condition" as charged in Count 2 of the information and was

not "disorderly conduct," as provided by Title 36 of the Code of Federal Regulations, Section 2.34(a)(4).

Although this case only involves the due process rights of the individual Defendants, the opinion of the United States Court of Appeals for the Ninth Circuit concerns all who participate in hazardous activities everywhere, because the Circuit Court assumes that there is a risk of harm to the public from what the Circuit Court considered the hazardous nature of the activity; so that hazardous activities anywhere might cause public harm and are per se disorderly conduct.

The opinion of the Circuit Court makes participants in all hazardous sports, viz. rock climbing, hang gliding, ski jumping, white water rafting, and many others, guilty of disorderly conduct because of a presumed risk without proof of harm to the public and violates the due process rights and liberty interests of the individual Defendants to choose their sport under the Fifth Amendment to the Constitution of the United States and should be reversed.

Wherefore, Petitioners, MARK C. ALBERS, JIM T. FREEGARD, DAVID W. MORAN, ERIN MORAN, DAVID PIERCE, CARMEL PRESSE, J. LYLE PRESSE, JEFF SCHLABS, MARK SHEEHAN, KIRK SMITH, DAVID M. STROBEL, and STEVE VAN HORN, request that this United States Supreme Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of the United States Court of Appeals for the Ninth Circuit convicting Defendants of disorderly conduct, in violation of Title 36 Code of Federal Regulations, Section 2.34(a)(4) and Title 18 United States Code, Section 2; and

Upon review, Petitioners request that this United States Supreme Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit and acquit all defendants of the charge of disorderly conduct.

Respectfully submitted,

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. MARK C. ALBERS; JIM T. FREEGARD; DAVID W. MORAN; ERIN MORAN; DAVID PIERCE; CARMEL PRESSE; J. LYLE PRESSE; JEFF SCHLABS; MARK SHEEHAN; KIRK SMITH; DAVID M. STROBEL; STEVE VAN HORN, *Defendants-Appellants.*	No. 99-10071 D.C. No. CR-95-00448-RGS OPINION and ORDER DENYING THE PETITION FOR REHEARING

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted
February 7, 2000 – San Francisco, California

Filed September 7, 2000

Before: Procter Hug, Jr., Chief Judge,
Dorothy W. Nelson, and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge D.W. Nelson

COUNSEL

Fred M. Morelli, Jr., Aurora, Illinois, for the defendants-appellants.

Camille D. Bibles, *Assistant United States* Attorney, Phoenix, ariozna, for the plaintiff-appellee.

ORDER

The opinion filed on July 17, 2000 is hereby WITHDRAWN.

SO ORDERED.

OPINION

D.W. NELSON, Circuit Judge:

National Park Service rangers arrested Mark Albers and eleven others (collectively "Albers" or "the defendants") for BASE jumping in the Glen Canyon National Recreation Area. The government charged the defendants with delivering and retrieving persons by parachute, in violation of 36 C.F.R § 2.17(a)(3), and disorderly conduct, in violation of 36 C.F.R. § 2.34(a)(4). Subsequent to a bench trial, the district court found the defendants guilty of both counts. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The acronym in BASE jumping refers to the structures off of which enthusiasts of the extreme sport jump with the use of a chute: Buildings, Antennas (radio and television towers), Spans (bridges), and Earth (cliffs). BASE jumpers have leapt from the Empire State Building, the Eiffel Tower, Angel Falls in Venezuela (the highest waterfall in the world), the 98-foot Christ statue in Rio de

Janeiro, and the World Trade Center. While the United States Parachute Association recommends that skydivers open their parachutes at a minimum elevation of 2,000 feet, most BASE jumps are made from 1,000 feet or less. *See* Ellen Lord, *Parachutist's Death Revives Debate Over Daredevil Jumps*, Cincinnati Post, Oct. 27, 1999, at 10A. BASE jumping has one of the sporting world's highest fatality rates with over 45 jumpers having died in its 18-year history. See Karl Taro Greenfield, *Life on the Edge*, Time Mag., Sept. 6, 1999, *available in* 1999 WL 25725124.

On May 1, 1995, Park Service Ranger Chris Cessna received word that a group of individuals were BASE jumping at Lake Powell in the Navajo Canyon area of Glen Canyon. BASE jumping is prohibited in Glen Canyon, as it is in all other national parks with the exception of the New River Gorge National Park.[1] Upon reaching the Navajo Canyon, Ranger Cessna saw a houseboat at the base of the canyon wall; a 100-foot climbing rope was anchored from the rim of a 400-foot cliffs section. The ranger, seeing several of the defendants on the boat with items associated with BASE jumping, such as knee pads and Protec helmets, climbed on board to investigate. While Ranger Cessna was inspecting the houseboat, other defendants, also carrying BASE jumping gear,

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[1] BASE jumping from the 870-foot New River Gorge Bridge began shortly after it opened in 1977 and several years prior to the area being designated as a national park. The Park Service, after taking possession of the river under the bridge, granted permission for BASE jumpers to leap from the bridge on the third Saturday of each October. *See The National Parks: Thrilled to Death*, The Economist, Nov. 13, 1999, *available in* 1999 WL 29811476.

approached in a motorboat. A second ranger, Phil Hibbs, located additional BASE jumpers and their gear on the shoreline of Lake Powell. No other boats were in the area.

The government charged the defendants with two counts: (1) air delivery without a permit in violation of 36 C.F.R § 2.17(a)(3); and (2) disorderly conduct in violation of 36 C.F.R. § 2.34(a)(4). The defendants, asserting that BASE jumping is a type of powerless flight permitted under 36 C.F.R. § 2.17(a)(1), moved to dismiss under Fed.R.Crim.P. 12(b)(2);[2] the district court denied the motion on October 10, 1996. The defendants also filed motions to suppress evidence and their statements. The district court determined that film and videotape found on the houseboat should be suppressed and also granted the motion to suppress the defendants' statements. On appeal, this court reversed the district court order suppressing the evidence and remanded the matter for trial. *See United States v. Albers*, 136 F.3d 670, 674 (9th Cir. 1998). Finally, the defendants, arguing that the Park Service's jurisdiction to prohibit air delivery on Lake Powell is preempted by the Federal Aviation Administration ("FAA"), filed a second motion to dismiss. On August 11, 1998, the district court denied this motion.

The bench trial commenced on September 4, 1997, at the end of which the district court found the defendants guilty of both counts charged. The judge sentenced each defendant to pay a fine of $500, $345.23 for the cost of the

---

[2] Fed. R. Crim. P. 12(b) requires that "[d]efenses and objections based on defects in the indictment or information . . . " be raised prior to trial.

prosecution, and a $20 special assessment fee. The defendants timely appealed.

DISCUSSION

I

The Park Service proscribes BASE jumping under its regulations governing aircraft and air delivery. *See* 36 C.F.R. § 2.17. The relevant provision prohibits "[d]elivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit." 36 C.F.R. § 2.17(a)(3). We give substantial deference to the Park Service's interpretation of this regulation, *see Department of Health and Human Servs. v. Chater*, 163 F.3d 1129, 1133 (9th Cir. 1998), "unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.' " *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)).

Most significantly, Albers argues that § 2.17(a)(3) is ambiguous as the "ram-air aeroelastic wings" used by the defendants are a type of aircraft and a preceding provision, § 2.17(a)(1), permits the "operating or using [of] aircraft" on designated lands and waters. Whether a regulation is unconstitutionally vague is a question of law subject to de novo review. *See United States v. Erickson*, 75 F.3d 470, 475 (9th Cir. 1996). In arguing that the defendants' chutes are aircraft, "a device that is used or intended to be used for human flight in the air, including

powerless flight," 36 C.F.R. § 1.4(a), and not parachutes, Albers relies on the sophisticated technology of the equipment: a "rectangular shaped ram-air aeroelastic wing . . . made of cloth with cross-sewn shaped fabric ribs designed with the aerodynamic characteristics of an aircraft wing intended for maneuverable powerless flight through the air. . . . " Albers also emphasizes its versatility:

> [T]he rectangular shaped ram-air aeroelastic wing used by Defendants can be fitted with a gondola, powered with a fan and flown through the air; or it can be fitted with a frame like a hang glider or equipped with a harness; and is maneuverable and can be steered around trees and other objects; and can be used in downhill runs to avoid pylons similar to downhill skiing slalom.

Despite the equipment's impressive characteristics, the Tenth Circuit, the only other circuit to have addressed this question, held that "[t]echnological improvements in the shape, maneuverability, and control of modern parachutes, including those used here, do not make them cease to be parachutes." *United States v. Oxx*, 127 F.3d 1277, 1279 (10th Cir. 1997). We agree and we also think that ordinary people would find that the chutes, although technologically sophisticated, are still parachutes. *See Erickson*, 75 F.3d at 475 (holding that a regulation is not unconstitutionally vague if it is capable of a limited interpretation such that ordinary people could understand what conduct is prohibited and those enforcing it are provided with clear standards).

Our determination here is supported by the defendants' own expert witness, Adam Filippino. In his testimony, Filippino, a manufacturer of BASE jumping equipment, described the defendants' gear as "ram air parachute[s]" and characterized both the ram-air and round parachutes as "types of parachute." He also identified two functional purposes of the BASE jumpers' ram-air parachutes: (1) "to slow [the jumper's] rate of descent to avoid dying at the bottom," and (2) "to cover the distance between where you open and where the boat is waiting for you." These purposes are consistent with the term "parachute" as defined in the federal regulations: "a device used or intended to be used to retard the fall of a body or object through the air." 14 C.F.R. § 1.1.

Given that the ram-air chutes used by the defendants are parachutes, BASE jumping does not qualify as powerless flight. Albers' contention that the National Park Service has defined powerless flight devices, a class of aircraft, to include parachutes is at odds with the regulatory history of § 2.17(a)(3). In 1975, the Department of Interior proposed a definition of powerless flight which included "[t]he launching or landing of recreational gliders, sailplanes, *parachutes*, body kites, hang gliders, and other devices designed to carry persons or objects through the air . . . " 40 Fed.Reg. 36,378 (1975) (emphasis added). The final regulation, however, omitted reference to parachutes. *See* 40 Fed.Reg. 57,695 (1975); *see also* 48 Fed.Reg. 30,258, 30,268 (1983). We defer to the agency's interpretation of this omission and read the final regulation as excluding parachutes from the category of powerless flight devices.

Finally, Albers contends that the term "delivery" as used in the prohibition under § 2.17(a)(3) against "[d]elivering or retrieving a person or object by parachute . . . " is generally understood as the "giving, handing over or transfer from one person to another." In other words, Albers, reasoning that delivery "is usually construed to include more than one person," maintains that the defendants cannot be convicted under § 2.17(a)(3) for an activity which involves pushing oneself off structures. We decline to define the term to exempt self-delivery and choose instead to adopt the Tenth Circuit's determination that "moving oneself from one area to another, as defendants did, constitutes delivery." *Oxx*, 127 F.3d at 1279.

We acknowledge that the regulation of BASE jumping under § 2.17(a)(3) is not the most organic fit. Because of the deference owed to an agency's interpretation of its regulations, however, we conclude that BASE jumping is prohibited under § 2.17(a)(3). The ram-air chutes used by the defendants to BASE jump are a type of parachute and do not therefore meet the regulatory definition of aircraft as a form of powerless flight.

II

In accordance with their argument that ram-air parachutes qualify as aircraft, the defendants assert that the FAA has authority over this matter as it has exclusive jurisdiction over the airspace above, and surface of, Lake Powell. The FAA Administrator has jurisdiction to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the

efficient use of airspace." 49 U.S.C. § 40103(b)(1) (1996). With respect to the landing of ram-air chutes in national parks, however, the FAA does not have exclusive jurisdiction and nothing precludes the Department of Interior from, as here, promulgating regulations to prohibit such landings. *See* 16 U.S.C. § 3 (1992); 36 C.F.R. § 7.70(a)(6).

III

The district court, determining that the defendants recklessly created a risk of harm to themselves and to members of the public, convicted them of disorderly conduct under 36 C.F.R. § 2.34(a)(4):

> A person commits disorderly conduct when, with intent to cause public alarm, nuisance, jeopardy or violence, or knowingly or recklessly creating a risk thereof, such person . . . [c]reates or maintains a hazardous or physically offensive condition.

On appeal, Albers argues the defendants cannot be convicted of disorderly conduct as no member of the public was alarmed, disturbed, or offended by their BASE jumping activities. We review the district court's interpretation of § 2.34(a)(4) de novo. *See United States v. Hoff*, 22 F.3d 222, 223 (9th Cir.1994). When considering the sufficiency of evidence to support a conviction, we review the record in the light most favorable to the government to determine whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See id.* at 224.

A conviction under § 2.34(a)(4) is uncommon; only one federal court has addressed its contours. *See United*

States v. Carroll, 813 F. Supp. 698, 704-05 (E.D. Mo. 1993). We therefore find it useful to first define the germane terms contained in the regulatory provision. The government claims that the defendants recklessly engaged in BASE jumping so we begin by construing the meaning of the term "recklessly." Because the statute does not define "recklessly," we must derive the meaning of the term from other sources. *See United States v. Karlic*, 997 F.2d 564, 569 (9th Cir. 1993). In *Karlic*, we consulted the Model Penal Code to divine the meaning of "knowingly" and "recklessly" under the Sentencing Guidelines, which do not define either term. *See id.* Accordingly, we find it useful here to refer to the Model Penal Code's definition of "recklessly" by way of analogy:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Model Penal Code § 2.02(2)(c) (1985). The Supreme Court has, moreover, explained that the criminal law generally permits a finding of recklessness only when persons disregard a risk of harm of which they are aware. *See Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994). We thus conclude that the relevant inquiry in finding recklessness here is

whether the defendants deliberately disregarded a substantial and unjustifiable risk of creating a hazardous or physically offensive condition of which they were aware.

We must next give meaning to the term "public," which is not defined in § 2.34(a)(4). We again find it useful to consult the Model Penal Code, which defines "public" as "affecting or likely to affect persons in a place to which the public or a substantial group has access. . . . " Model Penal Code § 250.2(1) (1962). BASE jumping in a national recreation area certainly satisfies the latter portion of the definition for, as Justice Roberts has noted, "parks . . . have immemorially been held in trust for the use of the public . . . " *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). The more difficult question is whether the defendants' BASE jumping activities affected or were likely to affect others.

The safety threat implicated in BASE jumping is most often the potential harm to the jumper due to the fatalities and injuries characterizing the extreme sport. We do not, however, discount the safety risks of BASE jumping posed to members of the public, particularly in areas where people are likely to congregate. *See Carroll*, 813 F.Supp. at 704 (finding that BASE jumping from the St. Louis Arch, which is located in the eastern part of downtown St. Louis, was hazardous to those on the ground). The appellants respond by arguing that they were jumping in a remote part of Glen Canyon. The evidence shows, though, that there were occasionally other boats in the area. The risk of harm to those on the boats is real as one of the defendants here collided into the BASE jumpers' houseboat. Visitors to the national park, moreover, have

no reason to be on guard for BASE jumpers as they might for those taking part in activities which are permitted such as rock climbing or hang gliding. We therefore affirm the district court's determination that BASE jumping can create a risk of harm to the public and defer to the courts' evidentiary findings. *See Hoff*, 22 F.3d at 224.

With this opinion, the appellants' Petition For Rehearing is otherwise denied.

AFFIRMED.

Title 14 Code of Federal Regulations, section 1.1(a)

> *Parachute* means a device used or intended to be used to retard the fall of a body or object through the air.

Title 36 Code of Federal Regulations, Section 2.17(a)(1) and (3)

> (a) The following are prohibited:
>
> (1) Operating or using aircraft on lands or waters other than at designated take-off or landing areas, except pursuant to the terms and conditions of a permit.
>
> . . .
>
> (3) Delivering a person or object by parachute, helicopter, or other means of air delivery, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit. For the purposes of this subparagraph, "delivery" means the act of conveying or releasing persons or property.

Title 36 Code of Federal Regulations, Section 2.34(a)(4)

> (a) A person commits disorderly conduct when, with intent to cause public alarm, nuisance, jeopardy or violence, or knowingly or recklessly creating a risk thereof,

such person commits any of the following prohibited acts:

. . .

(4) Creates or maintains a hazardous or physically offensive condition.

Title 36 Code of Federal Regulations, Section 7.70(a)(6)

7.70 Glen Canyon National Recreation Area

(a) Designated airstrip.

(6) The entire surface of Lake Powell subject to the restrictions contained in Section 2.17 of this chapter.

UNITED STATES DEPARTMENT OF THE INTERIOR
National Park Service

Special Use Permit

Name of Use **Site Use/BASE Jumping/Landing**

Date Permit Reviewed 2000, 27/Jun
Reviewed 19_____
Reviewed 19_____
Expires 2000 21/Oct

Long Term XX

Short Term

Permit #

BASE	NERI	2170	00-35
Event	Park	Type	No #

New River Gorge NR – Fayette Station
Name of Area

Avery Badenhop **P.O. Box 2507**
Bridge Day Association **Petaluma, CA 94953-2507**
Name or Permittee Address

707-773-3950
Phone

is hereby authorized during the period from (Time **9:00 AM** day **21** Month **Oct 2000**), through (Time **3:00 PM** day **21** Month **Oct 2000**), to use the following described land or facilities in the above named area:
Fayette Station

For the purpose(s) of: Fayette Station to be used for intentional parachute landings following BASE jumps from the New River Gorge Bridge on Saturday, October 21, 2000. Set-up to begin at 8:30 AM on October 21, 2000; event (jumping) to start at 9:00 AM and end at 3:00 PM.

Clean-up/take-down to be completed by 3:30 PM. Approximately 400 participants.

PLEASE NOTE THE ATTACHED SPECIAL CONDITIONS ARE A PART OF THIS PERMIT.

Authorizing legislation or other authority (RE-NPS-53 Appendix 1): 16 U.S.C. § 1a-1 P.L.95-625 sec. 507(b)

NEPA Compliance: CATEGORICALLY EXCLUDED XX EA/FONSI _____ EIS _____ OTHER APPROVED PLANS _____ PERFORMANCE BOND: Required Not Required XX Amount $00.00

LIABILITY INSURANCE: Required ___ Not Required XX Amount $0.00, with National Park Service named as additional insured. The Permittee hereby agrees to save and hold harmless the United States of America, its agents and employees, from any and all claims, damages, suits at law or equity of whatever kind of nature for damages to or loss of property or injury or death to persons resulting directly or indirectly from or attributable to the Permittee for its employees in connection with the activities authorized by this permit.

ISSUANCE of this permit is subject to the conditions on the reverse hereof and appended pages and when appropriate to the payment to the U.S. Dept. of the Interior, National Park Service of the sum of $150.00 (paid) with an Administrative Cost Recovery Fee of $350.00. (paid)

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied herein.

PERMITTEE /s/ [Illegible] 7-10-00
Signature Date

Authorizing Official
/s/ [Illegible] 7/14/00
Signature Date

CONDITIONS OF THIS PERMIT

1. The permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with all applicable laws and regulations of the area.

2. Damages – The permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the permittee is authorized to make of the land described in this permit.

3. Benefit – Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this permit or derive, either directly or indirectly, any pecuniary benefits to arise therefrom: Provided, however, that nothing herein contained shall be construed to extend to any incorporated company, if the permit be for the benefit of such corporation.

4. Assignment – This permit may not be transferred or assigned without the consent of the Superintendent, in writing.

5. Revocation – This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Superintendent.

6. The permittee is prohibited from giving false information; to do so will be considered a breach of conditions and be grounds for revocation [Re: 36 CFR 2.32(4)].

7. Permittee will comply with applicable public health and sanitation standards and codes.

8. The following provisions constitute Condition 4 in accordance with Executive Order No. 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967.

   NONDISCRIMINATION. If use of the resource covered by their permit will involve the employment by the Permittee of a person or persons, the Permittee agrees as follows.

   (a) The Permittee will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin, or disabling condition. The permittee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, age, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Permittee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Superintendent setting forth the provisions of this nondiscrimination clause.

(b) The Permittee will, in all solicitations or advertisements for employees placed by or on behalf of the Permittee, state that all qualified applicants will have consideration for employment without regard to race, color, religion, sex, age, or national origin.

(c) The Permittee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Superintendent, advising the labor union or workers' representative of the Permittee's commitments under Section 202 of Executive Order 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Permittee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Permittee will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by the rules, regulations, and relevant orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the Superintendent and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the Permittee's noncompliance with the nondiscrimination clauses of this permit or with any of such rules, regulations, or orders, this permit may be cancelled, terminated, or suspended in whole or in part and the Permittee may be declared ineligible for further Government contracts or permits in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965,

as amended, and such other sanctions may be imposed and remedies invoked as providing in Executive Order No. 11246 of September 24, 1965, as amended, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Permittee will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or order of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontract or purchase order as the Superintendent may direct as a means of enforcing such provisions, including sanctions for noncompliances; Provided, however, that in the event the Permittee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction of the Superintendent, the Permittee may request the United States to enter into such litigation to protect the interests of the United States.

9. The permittee agrees to save and hold harmless the United States of America, its agents and employees, from any and all claims, damages, suits at law or equity of whatever kind of nature for damages to or loss of property or injury or death to persons resulting directly or indirectly from or attributable to the permittee or its employees in connection with the activities authorized by this permit.

In addition the Permittee agrees to carry a general liability insurance policy in the amount of $0.00 in which the National Park Service is named additionally insured in that policy only in relation to activities on NPS lands. A certificate of that insurance must accompany the Special Use Permit when submitted for approval by the Superintendent.

10. The permittee will comply with all Federal, State and County laws, regulations and ordinances within the New River Gorge National River.

11. The permittee must designate an on-site liaison person(s) with the National Park Service *(PLEASE LIST).*

Name	Position/Title	Phone Number
1. Avery Badenhop	Event Coordinator	(707) 773-3950
2. Dennis McGlynn	Exit Area Manager	(530) 584-4747
3. Henry Parker	Exit Area Manager	(561) 778-2657

12. The permittee acknowledges that this permit grants **non-exclusive use of the site.** Permittee shall ensure that the rights and privileges of other park visitors are recognized.

    The permittee recognizes that this is a revocable permit and may be revoked at the discretion of the Superintendent or his designee upon 24 hour notice, or without notice if damage to resources or facilities is threatened, if public health and safety is jeopardized or the permitted activities would constitute an unacceptable conflict among visitor use activities, notwithstanding any other term or condition of the permit to the contrary.

    Permittee will remit to NPS $150.00 application fee (paid) with an Administrative Cost Recovery Fee of $350.00 for recovery of costs incurred by NPS in conjunction with this event. If any additional costs are incurred during the course of this event, the

permittee will be billed for the balance at the conclusion of the event.

Request **to cancel or reschedule** the permitted event must be in writing, at least two weeks in advance of the scheduled event day. In case of cancellation, only site use fees will be refunded. **Administrative fees are non-refundable.**

13. The permittee, upon terminating the event specified in the Special Use Permit, will leave the area/site in the same condition as it was prior to use.

SPECIAL CONDITIONS
PERMIT BASE-NERI-2170-00-35
BRIDGE DAY ASSOCIATION (BDA)
AIR DELIVERY OF PERSONS BY PARACHUTE
LANDING ON NPS PROPERTY (FAYETTE STATION)

The Special Use Permit, BASE-NERI-2170-00-35, is subject to the following terms and conditions:

1. All jumpers jumping in the timeframe of the permit must register with Bridge Day Association (BDA). The BDA will compile and keep a bona fide/accurate list of individuals registered to jump. This list will include the individual's name, address and date of birth. This list will be made available to the National Park Service at their request.

2. The BDA will assist in verifying that Item #1 is accurate. An honest attempt will be made by the BDA to assure that false names and information are not included on the participant list. The BDA will not knowingly and/or willingly allow individuals to register for the jump using false or inaccurate names or required registration information. Any infractions may result in the termination of this permit.

3. BDA will notify all individuals registering to jump that they will be required to have on their person a photo ID, in addition to the BDA-provided jumper registration arm band, at all times during the event.

4. All jumpers must jump from the new River Gorge Bridge pre-designated launch point and at the direction of BDA officials. Jumps from areas other than the New River Gorge Bridge pre-designated launch point are not authorized.

5. All jumpers must participate under BDA guidelines and all provisions of this permit. Any infractions by one individual may result in that particular individual being denied to participant [sic] in the event under this permit. Any infractions by one individual may also result in the termination of this permit.

6. All jumpers must deploy or attempt to deploy a parachute for landing. Tandem jumps utilizing only one parachute are prohibited.

7. All injuries requiring medical attention associated with this Special Use Permit will be reported to the Chief Ranger's Office, New River Gorge National River, within 10 working days of the close of this event. At a minimum, the name and address of the injured person and the type of injury will be reported.

8. BDA will provide their own watercraft for rescue purposes through a contract with a reputable, local whitewater rafting company (I.e. Wildwater Expeditions Unlimited or other comparable rafting company, selected with NPS prior approval). Whitewater rafting company selected will work under the supervision of the National park Service Incident Command System.

9. No multiple jumps from the bridge will be allowed unless coordinated in advance with the National

Park Service and the selected whitewater rafting company water personnel.

a. BDA jumping officials (jumpmaster) will establish and maintain direct communications with and between the selected whitewater rafting company water personnel.

b. No more than one jumper in the air per available rescue boat unless approved in advance by the selected whitewater rafting company water personnel.

c. Jumping will be suspended any time National Park Service personnel or the selected whitewater rafting company water personnel request.

d. The jumpmaster will automatically suspend jumping any and every time that at least one empty rescue boat is not available.

10. A maximum of two (2) jumpers will be in the water at one time. Anytime two or more jumpers are in the water at one time, jumping will be temporarily stopped until given the go ahead from rescuers at river level.

11. If permittee and participants adhere to all provisions and conditions of this permit, the National Park Service will consider issuing a Special Use Permit to the permittee for Bridge Day 2001.

/s/ Henry Law
Henry Law
Assistant Superintendent
New River Gorge
National River

/s/ Avery Badenhop
Avery Badenhop
Event Coordinator
Bridge Day
Association